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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1971

71 - 145

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, for herself and for DAVID R. PICKNEY, MRS. WALTER C. HAWKINS, and THOMAS E. PICKNEY, a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,

Plaintiffs and Petitioners,

vs.

ORO DAM CONSTRUCTORS, a joint venture etc., et al.; and WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Defendants and Respondents.

PETITION OF MILDRED A. PICKNEY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

(a) Appended to this petition are:

(i) Judgment of the United States Court of Appeals for the 9th Circuit Affirming Dismissal of Plaintiff's Action in the United States District Court for the Eastern District of California.

(ii) Judgment of the United States District Court for the Eastern District of California, entered April 25, 1969, Dismissing Plaintiff's Action.

(iii) Order of U.S. District Court for the Eastern District of California filed Nov. 20, 1968, that Defendant Western Pacific Railroad Company's Motion to Abate or Dismiss be, and the same is, hereby denied.

(b) Pickney was employed at time of his death as a locomotive engineer for Oro Dam Constructors, contractors building Oroville Dam and providing common carrier rail service at the Dam for the State of California and others, but at the time of his death was not moving interstate freight.

Plaintiff, petitioner, claims that Oro Dam Constructors performed an operational activity for Western Pacific Railroad Company in moving all rail freight to and from said Dam over Western Pacific Railroad Company's right of way to the Dam subject to Interstate Commerce Commission control.

(i) The date of the Judgment of the United States Court of Appeals for

the Ninth Circuit sought to be reviewed is April 30, 1971. Said judgment was entered April 30, 1971.

(ii) The date of the Order Denying Rehearing was June 4, 1971.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 45 U.S.C. 51.

(c) Whether Pickney at the time of his death was entitled to the protective provisions of 45 U.S.C. 51 as against Oro Dam Constructors and Western Pacific Railroad Co. or did Western Pacific Railroad Co.'s freight bills to Zephyr instead of the Dam and the tariffs under which said freight moved limit the protective provisions of F.E.L.A. so as to exclude railroad employees of Oro Dam Constructors.

(d) 45 U.S.C. 51 is as follows:

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

(e) A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS (OR LEGAL CONCLUSIONS) MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

(1) CONTRACT TO RELOCATE WESTERN PACIFIC RAILROAD COMPANY'S RIGHT OF WAY LEFT PART OF RELOCATED RIGHT OF WAY TO THE DAM SUBJECT TO INTERSTATE COMMERCE COMMISSION CONTROL.

Contract dated June 28, 1957 between State of California and Western Pacific Railroad Company to relocate said railroad's main line right of way in the Feather River canyon (Pl.'s Exh. 1, R. 22, 27) was executed contingent upon Governmental Approval (page 35) of said contract.

That part of Western Pacific Railroad Company's main line running downstream from the Dam to Zephyr or the interchange tracks has, at all times before said contract was executed and since that time, remained a part of the Western Pacific Railroad Company's interstate line of tracks (pages 41-43 of said Exh.) subject to regulatory authority of the Interstate Commerce Commission, Pl.'s Exh. 12, R. 74, 75, Western Pacific's Application for Abandonment, Construction and Trackage Right Before the I.C.C., Pl.'s Exh. 14, R. 75, I.C.C. - Order.

(2) CONTRACT TO BUILD OROVILLE DAM AND PROVISION THERE-IN FOR COMMON CARRIER RAILROAD FREIGHT SERVICE TO DAM LOCATION.

Contract dated July 30, 1962 (Pl.'s Exh. 4, R. 41) between the State of California and the Oro Dam Constructors provided for Common Carrier Service by Railroad at the Dam site for the benefit of the State and all other suppliers of materials, including, but not limited to, the prime contracts let and to be let as listed on page 35 of said contract. Said contract under Section 17(j), pages 49 and 50, required Oro Dam Constructors to maintain and operate said railroad facility for the purpose of providing Common Carrier Railroad Service between Zephyr, the interchange tracks, and the Dam, or, if Oro Dam Constructors did not elect to provide said service then Western Pacific shall provide the same. Said interchange is 3.69 miles downstream from the Dam, as shown by Western Pacific's "Consolidated Application for Abandonment, Construction and Trackage Rights" filed with the Interstate Commerce Commission (Pl.'s Exh. 12, R. 74, 75) on

page 4 therein. The interchange tracks began a few hundred feet downstream of the tunnel entrance where the head-on collision occurred killing Pickney and three others (R. 95, lines 20-23).

(3) ZEPHYR, INTERCHANGE TRACKS, WHERE FREIGHT CARS WERE INTERCHANGED BETWEEN ORO DAM CONSTRUCTORS' RAILROAD AND WESTERN PACIFIC, FROM THE LATTER'S CONNECTING RE-LOCATED MAIN LINE.

Aside from being a connection between Western Pacific's old main line and its re-located line beginning in Western Pacific's freight yard at Oroville, it is best described by Mr. Greves, attorney for defendants, in his opening statement (R. 14, line 17 to end of paragraph):

"... between Zephyr and the damsite there are no members of the public who could ask for or receive common carrier service by rail because there is nobody that lives there; there is no industry located in there. This is a canyon and it's uninhabited. Even when Western Pacific Railroad was running its line in through there, there was no shipper to be served in this area, between Zephyr and what ultimately became the dam location, because there was no one in there." Only contract suppliers for the construction projects, including Oro Dam Constructors, would need Common Carrier Service at the Dam.

(4) FREIGHT BILLS ISSUED BY WESTERN PACIFIC FOR FREIGHT CAR CONSIGNMENTS TO ZEPHYR FOR MOVEMENT BY ORO DAM CONSTRUCTORS' RAILROAD TO THE DAM AND SAID DEFENDANT'S ADMISSIONS AS TO CONTINUED MOVEMENTS OF SAID FREIGHT CARS.

(A) Freight Bills:

The 79 Western Pacific freight bills included in Pl.'s Exh. 8, R. 59, 60, 68, show 74 interstate car shipments to Oro Dam Constructors' railroad at Zephyr and 5 intrastate car shipments set out at Zephyr.

Said 79 freight bills, without plaintiff's request, were assembled, photo-copied and handed to plaintiff's attorney by Ray Leonard, one of the attorneys for the defendants, as freight bills noted from the 1964 and 1965 demurrage records of Western Pacific at its Oroville freight station (R. 59, lines 22-23).

At this same time, without prior request, plaintiff's attorney delivered to Mr. Leonard a copy of the tariffs which make up Pl.'s Exh. 9, R. 61, 68.

Plaintiff's attorney was then permitted to look at the demurrage books for 1964 and 1965 from which notes were taken and used as the bases for the request for admissions filed by plaintiff on Feb. 4, 1969. Each defendant filed separate admissions thereto on February 26, 1969, as broken down under (B) below.

The 74 out-of-state car shipments to Zephyr show:

27 cars consigned to McDowell Wellman or McDowell Wellman Engineering Co. of which 7 were consigned to said Company or Companys % (in care of) O.D.C.

12 cars were consigned to McDowell or McDowell Co. of which 4 were consigned to either the individual or the

Company % O.D.C.

21 cars were consigned to Oro Dam Constructors.

1 car was consigned to O.D.C. % Claude Johnson.

5 cars were consigned to O.D.C. % Peterson Tractor or Peterson Tractor and Equipment Co.

3 cars were consigned to Peterson Tractor % O.D.C.

5 cars were consigned to Peterson Tractor or Peterson Tractor and Equipment Co.

(B) Western Pacific Railroad Co.'s Admissions filed Feb. 26, 1969 show:

82 freight cars were consigned to Zephyr with freight originating from out-of-state.

9 freight cars with consignments of freight originating within the State of California were set out at Zephyr.

4 freight cars were left at Zephyr siding by Oro Dam Constructors' railroad with consignments of freight for out-of-state destinations.

Oro Dam Constructors' Admissions filed Feb. 26, 1969 admit the movement of said freight cars from said siding to the Oroville Dam and at times to the "Borrow Area" from where the dirt fill for the Dam was taken.

All of said freight bills show

Zephyr, the interchange, as the beginning or ending point of all of said shipments. None of the shippers or consignees of said freight delivered or received their freight shipments at said point. All of said freight shipments were continued to, or started from Oroville Dam by Oro Dam Constructors' railroad operation or at times the "Borrow Area" from where the dirt fill for the Dam was taken.

(C) Differences Between Freight Bills and Western Pacific Admissions:

Although Western Pacific admits setting out 91 freight cars at Zephyr siding as shown by their two annual demurrage car record books for the two years of 1964 and 1965, yet they have provided plaintiff's attorney with only 79 freight bills for 79 freight cars set out at Zephyr as shown from said records. Since compiling said freight bills was a voluntary act on the part of Western Pacific Railroad Co., it seems likely the 12 omitted incoming freight cars bills and 4 interstate outgoing freight cars bills for the outgoing freight cars were better left omitted than explained by defendant. In any event, the only freight bills ever seen by plaintiff's attorney were the 79 making up Pl.'s Exh. 8, R. 59, 60, 68.

(5) CONTRACT BETWEEN CALIFORNIA AND WESTERN PACIFIC RAILROAD ALLOWED FOR ORO DAM CONSTRUCTORS TO USE WESTERN PACIFIC'S RIGHT OF WAY BETWEEN ZEPHYR AND THE DAM, AND MOVE COMMON CARRIER FREIGHT BETWEEN THE TWO POINTS.

Contract dated August 10, 1962, Pl.'s Exh. 2, R. 33, 34, between the State of California and Western Pacific Railroad

Company, supplemental to their contract of June 28, 1957, supra, provided in paragraph No. 1 on page 4 thereof, the purpose of said interchange, Zephyr siding, to be "... and further agrees that thereafter the Department [State of California] and its contractors shall have the right, at their convenience, to operate railroad equipment within that portion of the proposed interchange beyond the clearance point of the turnout located at Mile Post 210.38 [This is a new mile post number on the new relocated track different from the mile post numbers set forth in the old main line as given to the I.C.C. on page 4 of W.P.'s application to the I.C.C., Pl.'s Exh. 12, R. 74, 75, supra. Mile Post 210.77 on the old W.P. main line was at the dam site, as shown by said application to the I.C.C.] on the relocated line for the purpose of receiving railroad cars from and delivering railroad cars to Railroad Company." [Railroad Company means W.P.R.R. Co.]

Said Supplemental Contract between the State of California and Western Pacific Railroad Company, dated August 10, 1962, further specifically provided that the Common Carrier Service contracted for by the State of California for itself and others, if such service was provided by Oro Dam Constructors' railroad operation (Oro Dam Constructors had 120 days following July 30, 1962, the day the contract to build the Dam was executed in which to elect under Section 14, pages 40 and 41 of that contract, to use this part of Western Pacific's main line between Mile Post 207.08 and the Dam site Mile Post 210.77 as measured on the old main line of Western Pacific) and not by the Western

Pacific Railroad Company -- which was the fact -- then and in that event, said service was subject also to the following condition, beginning at the bottom of page 4 therein:

"... and provided further that such exclusive right to furnish common carrier railroad services shall not change the current practise regarding the interchange of common carrier freight between railroads."

The contract to build the Oroville Dam reserved the right to Common Carrier Service by railroad for the State of California and all others supplying materials for its construction, but in the event the Oro Dam Constructors elected to "use these railroad facilities (of Western Pacific Railroad), the Contractor shall make provisions for the movement of this freight from the interchange tract (Zephyr siding) to the power plant access tunnel (Oroville Dam). This movement will be limited to not more than one train per day schedules to suit the Contractors convenience." (Specifications Proposal and Contract for Construction of Oroville Dam, Pl.'s Exh. 4, R. 41, page 50.)

These are the facilities which were and still remain Western Pacific's right-of-way between the interchange or Zephyr siding and the Dam site.

While Oro Dam Constructors performed the contract to build the Dam for California according to specifications, including the movement of interstate freight between Zephyr siding and the Dam, all of Western Pacific's common carrier activities were limited to movements

between its relocated line and Zephyr siding. Had Oro Dam Constructors failed to perform this contract even though all bills of lading and freight bills as shown by Western Pacific Railroad Company's demurrage records for 1964 and 1965 (Pl.'s Exh. 8, R. 59, 60, 68) designated Zephyr siding as the destination for all interstate movements of freight moved by Western Pacific, then it would have been Western Pacific's exclusive obligation under Federal law as well as its contracts with the State of California (Pl.'s Exh. 2, R. 33, 34) to continue the interstate Common Carrier Service at the Oroville Dam site and from that point to Zephyr siding.

(6) PUBLISHED TARIFFS FOR MOVING RAIL FREIGHT BETWEEN OROVILLE AND OROVILLE DAM.

The published tariffs for hauling freight cars for the Dam were just as misleading as Western Pacific's freight bills were with respect to whether the interstate rail freight movement ended at Zephyr or at the Dam or, put another way, whether the protective provisions of F.E.L.A. ended at Zephyr.

Western Pacific's legal action with respect to the publishing of tariffs for freight hauling between Oroville and the Dam was not any more consistent than its practice of issuing freight bills to consignees in care of Oro Dam Constructors or at times to Oro Dam Constructors in care of consignees. Both efforts showed a dual purposes, namely, to protect the right to receive freight hauling revenue between Oroville and Oroville Dam and at the same time eliminate the protective provisions of F.E.L.A. for that part of the movements made by Oro Dam Constructors.

Defendants concede that Western Pacific never operated beyond Zephyr (R. 13, lines 3-19).

On April 24, 1963, the first freight rate became effective between Oroville and Zephyr, California (Pl.'s Exh. 9, R. 61, 68), $40.00 per car and $50.00 per car, depending on the type of freight shipped.

"When the charge was first published, the charge was restricted to apply only in connection with shipments which moved to the spur track of the State of California." (R. 62, lines 5-8.)

Subsequently, under Pacific Southcoast Freight Bureau proposal 8877 (Pl.'s Exh. 10, R. 66,68, dated March 6, 1963), which again (noted under "Further Action" and some later proposal number) was notice of independent action by Western Pacific, charges were added of $50.00 and $60.00 per car which would apply on traffic movements over the spur track of California out of Zephyr, from Zephyr to the Oroville Dam (R. 62, lines 9-16). Said spur track is Western Pacific's right-of-way between Zephyr and the Dam. Western Pacific Railroad collected tariffs for interstate rail freight car movements made by Oro Dam Constructors.

At page 22 of Pl.'s Exh. 1, R. 22, 27 (Contract of July 28, 1957 to Relocate Western Pacific right of way) is the following:

"The existing siding of the Railroad Company Station at Oroville shall be extended a distance of approximately 2,500 feet from the beginning of the relo-

cation at Oroville to a point Easterly thereof along the route of the relocation." Easterly is upstream toward the Dam site and the beginning of Zephyr siding is in the freight yard of Western Pacific in the City of Oroville. All the tariffs listed in Pl.'s Exh. 9, R. 61, 68, should apply only to freight cars hauled by Oro Dam Constructors, since the beginning of Zephyr is in the Western Pacific's Station at Oroville.

The fifth revised page (of Pl.'s Exh. 9, R. 61, 68) of Tariff 300, effective July 17, 1963, added $50.00 and $60.00 charges per car and 5-1/2 cents per 100 pounds for weight in excess of 90,000 pounds per car to apply in connection with the traffic moved from Zephyr to Oroville Dam by Oro Dam Constructors (R. 63, line 24 to R. 64, line 8). Footnote (e) preceding the $50.00 and $60.00 car charges on said fifth revised page reads: "e -- Applies only on traffic for movement over spur track of the State of California (subject to note 2)" -- indicates that $10.00 per car of the $50.00 and $60.00 charges allowed was payment to Western Pacific for Oro Dam Constructors' movement of said cars between Zephyr and Oroville Dam.

The sixth revised page made applicable the same rate in the fifth revised rate page immediately supra to intrastate traffic on June 29, 1963. The effective date on interstate traffic remained July 24, 1963 (R. 64, lines 9-18).

The seventh revised page added a rate per car from Zephyr to Oroville City (R. 64, lines 19-22).

The "NOTICE OF INDEPENDENT ACTION 24" (Pl.'s Exh. 11, R. 66, 64) under caption Pro 9335, circulated on behalf of Western Pacific through Pacific Southcoast Freight Bureau (R. 70, lines 22-25), provided for rates of $50.00 and $60.00 per car from Oroville to Zephyr, which rates would apply on traffic for movement from Zephyr to Oroville Dam (R. 72, lines 1-5).

(7) IN RECOGNITION OF FEDERAL CONTROL OF ORO DAM CONSTRUCTORS' FREIGHT MOVEMENTS IS WESTERN PACIFIC RAILROAD CO.'S ACTION BEFORE THE INTERSTATE COMMERCE COMMISSION TO WITHHOLD SAID MOVEMENTS.

Under date of June 11, 1963, five or more months after Oro Dam Constructors began providing all Common Carrier Service at the Dam, Pl.'s Exh. 11, R. 68, 74, discloses Western Pacific Railroad Company's action to establish approved Interstate Commerce Commission rates for freight movements over its old main line from the interchange to the Dam site within less than the statutory period of time or on one day's notice, using as justification for said action the following as set forth therein:

"Effective April 24, 1963 the Western Pacific Railroad published charges of $40.00 and $50.00 per car to apply on freight as described Item 7490, my I.C.C. No. 1439, from Oroville, Calif. to Zephyr, Calif. These charges applied on movements to Western Pacific's connection with the spur track of the State of California to cover the movement of traffic for the Oroville Dam project. Under contract between the State of California and Western Pacific the latter has the right to provide service over spur track referred to. Since

rail connection between the Western Pacific and said spur track has just been completed and since tonnage for the Oroville Dam is currently moving it is the desire of the contractors to immediately use proposed service and charges applicable over said spur track so that delivery can be made to the dam site. Lacking immediate use of proposed service and charges shipments will be required to be held in contractor's yard at Oroville thus causing needless delay in construction program."

(8) WESTERN PACIFIC RAILROAD BY CONTRACT HAD THE RIGHT TO CONTROL ORO DAM CONSTRUCTORS' RAILROAD OPERATION IN ITS MOVEMENTS OVER WESTERN PACIFIC RAILROAD CO.'S RIGHT-OF-WAY BETWEEN ZEPHYR AND OROVILLE DAM.

The Contract form of October 26, 1962 Contract, Pl.'s Exh. 6, R. 28, 49, 53, following the word "WITNESSETH:", except for the underlined insertions in the 1st and 3rd paragraphs therein, was attached and marked Exhibit "C" to the Contract of June 28, 1957, Pl.'s Exh. 1, R. 22-27, executed between the State of California and Western Pacific Railroad Company, and also a verbatim copy of the same is inserted as APPENDIX 1 at pages 214 and 215 of the Contract to build the Dam, Pl.'s Exh. 4, R. 41.

Paragraphs numbered 5 and 6 of said Contract dated October 26, 1962, provide:

"5. Contractor hereby agrees to indemnify Railroad against and save it harmless from any and all claims, demands, costs, loss, damage, injury or liability howsoever same may be caused, resulting

directly or indirectly from the performance of any or all of the work to be done by Contractor on the premises of Railroad alongside of, under and above the tracks of Railroad by virtue of this agreement or by virtue of said agreement between the Department and Contractor, or by the presence of any person on the premises of or on or about the tracks of Railroad by virtue of this agreement or said agreement between the Department and Contractor." (The agreement between Department and Contractor is the contract to build the Dam, Pl.'s Exh. 4, R. 41.)

"6. Contractor shall comply with the rules and regulations of Railroad or the instructions of its representatives in relation to the proper manner of protecting the tracks and property of Railroad and the traffic moving on such tracks, as well as the wires, signals and other property of Railroad, its tenants or licensees at and in the vicinity of the work during the period of construction. Contractor, subject to the supervision and control of Railroad's Chief Engineer or other designated officer, shall perform Contractor's work in such manner and at such times so that said work shall not endanger or interfere with the safe operations of the tracks and property of Railroad and the traffic moving on such tracks, as well as wires, signals and other property of Railroad, its tenants or licensees at or in the vicinity of the work."

(9) AN INSURANCE POLICY PROTECTING WESTERN PACIFIC RAILROAD COMPANY'S CONTINUING DUTY TO PROVIDE COMMON CARRIER SERVICE AT THE DAM FOR THE STATE OF CALIFORNIA AND OTHERS SHOULD ORO DAM CONSTRUCTORS' COMMON CARRIER SERVICE BE DISRUPTED.

The Use and Occupancy Policy, No. RR 2008, issued by Fireman's Fund Insurance Company, Pl.'s Exh. 17, R. 17, is provided for Western Pacific Railroad Company's protection pursuant to the agreement dated October 26, 1962.

Said insurance policy insures Western Pacific Railroad Company "... against business interruption as described herein."

"1. ... arising out of or connected with the operations of Oro Dam Constructors ... on or adjacent to the properties of the named insured on or near the construction sites of ... Oroville Dam, ...

"2. Payment Rate: If, ... the named insured is unable to use the track, roadbed or other operating facilities for the movement of trains, the company shall be liable at the rate of $1,041.67 for each hour or fraction thereof during the period of such suspension of use.

"3. The length of time of interruption of business for which loss may be claimed:

(a) shall commence at the time the first train is detoured over an alternate route because of an insured loss and shall cease at such time as the insured's operating facilities become usable

(b) shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild or repair or replace such

described property as has been damaged or destroyed

(c) shall not exceed $500,000 in the aggregate during the term of this policy

"4. Resumption of Operations: It is a condition of this insurance that if the insured could reduce the loss resulting from the interruption of business by complete or partial resumption of operations of the operating facilities described, whether damaged or not, such reduction shall be taken into account in arriving at the amount of loss hereunder.

"5. Expense to Reduce Loss: This policy covers such expenses as are necessarily incurred for the purpose of reducing any loss under this policy not exceeding, however, the amount by which the loss hereunder is thereby reduced.

"6. Other Insurance: ...

"7. Loss Clause: ...

"8. Breach of Warranty Clause: ...

"CONDITIONS

"1. Carriers Clause. It is understood and agreed that the insured may accept without prejudice to this insurance the ordinary bills of lading or receipts issued by any carrier or other bailee, but it is agreed by the insured that this insurance shall not enure directly or indirectly to the benefit of the carrier or other bailee, by stipulation in bill of lading or otherwise, and in case of any

agreement or act, past or future, by the insured whereby any right of recovery of the insured, against any persons or corporations is released, lost or prejudiced, which would except for such agreement or act, pass to this company upon acceptance of abandonment or payment of loss, then this company shall not be bound to pay such loss, or to make any advance whatsoever to the insured by reason thereof.

"It is agreed by the insured that he has not and will not enter in any special agreement with any carrier, or bailee releasing them from their common law or statutory liability.

"2. Notice and Proof of Loss.
...

"3. Examination under Oath.
...

"4. Settlement of Claims. All adjusted claims shall be paid or made good to the insured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of this company.

"No loss shall be paid hereunder if the insured has collected the same from others.

"5. Subrogation. In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to

prejudice such rights.

"6. Suit. ...

"7. Appraisal. ...

"8. Cancellation. ...

"9. Premium. The payment of premium shall be the duty of Oro Dam Constructors and in no event shall payment of premium be an obligation of the named insured."

(10) AN INSURANCE POLICY COVERING WESTERN PACIFIC'S RISK OF PAYING AN OBLIGATION UNDER LAW TO AN INJURED EMPLOYEE OF ORO DAM CONSTRUCTORS, BUT RESTRICTED TO SUCH RIGHTS AS SUCH EMPLOYEE MAY HAVE UNDER THE F.E.L.A. AS AGAINST WESTERN PACIFIC; FREIGHT CAR DAMAGE OR LOSS AND FREIGHT DAMAGE OR LOSS WHILE IN THE POSSESSION OF ORO DAM CONSTRUCTORS.

The Bodily Injury Liability Policy, No. RR 2001, covered damages arising from Joe Pickney's death under the Federal Employer's Liability Act, for the benefit of Western Pacific Railroad Co., Pl.'s Exh. 18, R. 96. The first page of said exhibit in Item 2 incorrectly gives the policy period as "From September 26, 1962 To September 26, 1963." The correct Policy Period appears on the Final Page entitled "Declarations" in "Item 2. Policy Period: From September 26, 1962 To November 15, 1967 ... at the designated job sites as stated herein."

The covering provisions are for Bodily Injury Liability.

1. "To pay on behalf of the

insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury ..., including death at any time resulting therefrom, hereinafter called 'bodily injury', either (1) sustained by any person arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations, or (2) sustained at the designated job site by the contractor or any employee of the contractor or by any designated employee of the insured whether or not arising out of such acts or omissions." (The words "designated employee" as defined in Subsection (c) of Definitions of said policy includes those employees of Western Pacific who may from time to time be on the job site inspecting Oro Dam Constructors' railroad operation or other operations affecting said railroad operation, pursuant to numbered paragraphs 2, 3 and 6 of the contract between Western Pacific Railroad Co. and Oro Dam Constructors executed October 26, 1962, Pl.'s Exh. 6, R. 28, 53.)

This policy does not apply ("EXCLUSIONS", page 3 therein):

"(e) under Coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law; provided that the Federal Employers' Liability Act, U.S. Code (1946) Title 45, Sections 51-60, as amended, shall for the purposes of this insurance be deemed not to be any similar law;".

"(a) to liability assumed by the insured under any contract or agreement

except a contract as defined herein;".

Under Subsection (d) of
II. Definitions --

"Contract - The word 'contract' means any contract or agreement to carry ... property for a consideration ..., trust of interchange contract or agreement respecting motive power, rolling stock or ..."

(The contract to build the Dam was such a contract as defined herein since it made provision for Oro Dam Constructors to collect for the freight it hauled for others, at page 50 of said contract, the last paragraph of Section 17, Pl.'s Exh. 4, R. 41.)

The contract between the State of California and Western Pacific Railroad dated August 10, 1962, Pl.'s Exh. 2, R. 33, 34, was also one of the defined contracts allowing for the assumption of liability without coming within said exclusionary provisions of subsection (a) since it was an agreement of trust of interchange contract of railroad freight or agreement respecting motive power, rolling stock at the interchange track.

There are listed 19 conditions in said policy to the insured company's liability thereon.

Condition number --

"12. No Benefit to Bailee [Relating to Coverage C or 3rd party property damage claims]

"The insurance afforded

by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee, other than the named insured, liable for loss to the property."

Condition number --

"13. Subrogation. In the event of any payment under this policy, the company shall be obligated [subrogated] to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

The second paragraph of Condition No. 1 of the Insurance Company's "Use and Occupancy Policy", Pl.'s Exh. 17, R. 96, supra, is as follows:

"It is agreed by the insured that he has not and will not enter in any special agreement with any carrier or bailee releasing them from their common law or statutory liability."

Said Liability Policy in addition to protecting Western Pacific from claims of Oro Dam Constructors' employees under the Federal Employer's Liability Act, as well as its own employees, assigned to supervise or work on the Oro Dam Constructors' railroad under coverage A (Bodily Injury Liability) of paragraph No. 1, also

Under coverage B (Property Damage Liability) agrees:

"To pay on behalf of the insured all sums which the insured shall become

legally obligated to pay as damages because of physical injury to or destruction of property, including the loss of use of any property due to such injury or destruction, ... arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations." This coverage should relate to freight cars and shipments in them while Oro Dam Constructors had possession of freight cars left or picked up at Zephyr.

Under coverage C (Physical Damage to Property) the insurer agrees:

"To pay for direct and accidental loss or damage to rolling stock and their contents, mechanical construction equipment, hereinafter called loss, arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations; provided such property is owned by the named insured or is leased or entrusted to the named insured under a lease or trust agreement."

This should cover the same losses that might occur under coverage B except that Western Pacific itself could collect for such a loss or damage to a freight car or its contents while Oro Dam Constructors had possession of it.

It should be here noted that at some later date the seven individual corporations and R. B. Potashnick, making up the joint venture of Oro Dam Constructors, as listed in the endorsement of said policy, Pl.'s Exh. 18, R. 96, also became named insureds in said policy, since the blank spaces at the bottom of said endorse-

ment had been completed as an endorsement not attached to the policy when it was first issued.

(11) JURISDICTION IS UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT, 45 U.S.C. 51 ET SEQ., AS SET FORTH ABOVE UNDER (d).

(h) A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT.

All the contracts in this action, omitting Western Pacific's freight car bills, Pl.'s Exh. 8, R. 59, 68, point to the contract right of the State of California to have common carrier railroad freight service at the Oroville Dam during the construction of said Dam and related projects.

There was no other purpose in constructing Zephyr siding. No one else could be served other than the contract suppliers for the State of California and other contractors.

Zephyr siding (beginning in Western Pacific's station at Oroville) was the point where Western Pacific's movements ended as long as Oro Dam Constructors continued freight car movements beyond Zephyr siding.

Oro Dam Constructors' movements of interstate car shipments to and from the Dam end of said siding cannot be any less an interstate freight movement than Western Pacific's movements for the same cars to and from Western Pacific's Oroville station end of said siding.

1. WESTERN PACIFIC FREIGHT BILLS TO ZEPHYR TO RESTRICT F.E.L.A. PROECTION.

Western Pacific's freight car bills designating Zephyr as the destination of freight car movements was incidental to the contract to build the Dam and provide common carrier service at the Dam. The interchange of freight cars between Western Pacific and Oro Dam Constructors was in accordance with the contract executed on August 10, 1962, between Western Pacific and the State of California, Pl.'s Exh. 2, R. 33, 34, and the common carrier service furnished by Oro Dam Constructors shall not change "... the current practise regarding the interchange of common carrier freight between railroads."

It just so happened that each of Western Pacific's freight bills, Pl.'s Exh. 8, R. 59, 68, included all freight within a freight car; also, it just so happened that all published tariffs between Oroville and Zephyr and between Zephyr and Oroville Dam relate only to loaded freight car movements, Pl.'s Exh. 9, R. 61, 68. Nothing in either of said Exhibits defeats the August 10, 1962 agreement, supra, respecting the interchange of car load common carrier freight between railroads.

Erie R. Co. v. Shuart, et al. (1919), 39 Sup. Ct. 519, 250 U.S. 465, holding: While freight remains in a freight car in interstate transit, even though in the possession of the consignees, it remains subject to the railroad's common carrier's responsibilities.

Though a car containing an interstate shipment of horses had arrived

at its destination, and the consignees were proceeding to unload the animals through a cattle chute owned and operated by the carrier, the transportation was not complete, and, where the horses were injured when other cars were pushed against the one being unloaded, written claim of loss, made a condition to liability in the bill of lading, must be given in order to support recovery against the carrier.

Except for the fact that Zephyr was the end of Western Pacific's freight car movements during the time Oro Dam Constructors moved freight cars to the Dam, there was no reason for Western Pacific to designate Zephyr as the destination of such freight in its 79 freight car bills included in Pl.'s Exh. 8, R. 59, 68, other than to restrict the protective provisions of the Federal Employer's Liability Act.

The plan to have all contract suppliers for Oroville Dam ship freight to and from the Dam by way of using Zephyr siding as the shipping point instead of the Dam was an attempt under 45 U.S.C. 55 to exempt Oro Dam Constructors and Western Pacific Railroad Co. from liability under the Federal Employer's Liability Act, 45 U.S.C. 51, in the movement of Common Carrier freight between Zephyr and the Dam.

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void ..." 45 U.S.C. 55.

Oro Dam Constructors has treated plaintiff's claim for wrongful death as a Workman's Compensation claim under

California law when as a matter of contract obligation performed, it provided Common Carrier service by railroad at the Oroville Dam site moving Common Carrier railroad freight between the Dam and Zephyr, a distance of at least 3.69 miles (not including the distance moved on Zephyr siding).

Zephyr siding, sometimes referred to as the "interchange tracks" or California spur, connects Western Pacific's old main line right of way with its new main line right of way about 3.69 miles downstream from the Dam. (Zephyr siding parallels the relocated line as it moves east toward the Dam out of Western Pacific Railroad Co.'s Oroville station.)

The west entrance to Tunnel 4 where the head-on collision occurred killing Pickney and three others, was upstream from Zephyr, a few hundred yards between Zephyr and the Oroville Dam on the old Western Pacific main line right-of-way, a line of track under the jurisdiction of the Interstate Commerce Commission as a part of the Western Pacific Railroad Co.'s interstate line.

The largest individual consignee of the 74 interstate freight shipments included in Western Pacific's freight bills, Pl.'s Exh. 8, R. 59, 68, to Oroville Dam by way of continued movement from Zephyr was McDowell Wellman, at times designated on said freight car bills as McDowell Wellman Engineering Co. This company was not one of the seven corporations and one individual that made up the Joint Venture of Oro Dam Constructors with a contractor's License No. 210-670, whose exact legal names are listed on pages 192

and 194 of the contract to build the Dam, Pl.'s Exh. 4, R. 41.

Of the 27 out-of-State cars McDowell Wellman received from Oro Dam Constructors 7 were consigned to said company in care of Oro Dam Constructors. Also, 3 of the 8 cars consigned to Peterson Tractor, not a member of the Joint Venture, sometimes designated Peterson Tractor and Equipment Co. on Western Pacific's freight bills, were shipped to Peterson Tractor in care of Oro Dam Constructors.

It is of note what whatever Western Pacific's original plan was for issuing freight bills for car loads of freight to consignees at Zephyr, it did at times issue bills to individual consignees and at other times to such consignees in care of Oro Dam Constructors or to Oro Dam Constructors in care of individual consignees. There was not a uniformity of practice on the part of Western Pacific in making out those car load freight bills. However, the freight bills which indicated the car load shipments were in care of another person or corporation was to the extent of such indications an admission that consignments of freight generally were not planned to be delivered to said consignee by Western Pacific except through Oro Dam Constructors.

Oro Dam Constructors' contract obligation with the State of California, Pl.'s Exh. 4, R. 41, at page 50, also required it to move not more than one train per day of railroad freight over Western Pacific's right of way between Zephyr and the Dam.

2. TARIFFS PROVIDING REVENUE TO WESTERN PACIFIC FOR ORO DAM CONSTRUCTORS' FREIGHT HAULS.

Western Pacific Railroad Company's double purpose in issuing tariffs (Pl.'s Exh. 9, R. 61, 68) covering interstate freight car movements between Oroville and Oroville Dam is perhaps clearer than its freight bills (Pl.'s Exh. 8, R. 59, 68) to Zephyr. (Purpose to provide freight revenue to Western Pacific for car movements made by Oro Dam Constructors yet restrict protective provisions of F.E.L.A. to Western Pacific Railroad's movements to Zephyr.)

In Western Pacific Railroad Co.'s "Consolidated Application for Abandonment, Construction and Trackage Rights" before the Interstate Commerce Commission (on page 4 of Pl.'s Exh. 12, R. 74, 75) is the following:

"From a point at or near M.P. 205.47 at or near Oroville, California, to a point at or near M.P. 232.43 at or near Intake, California.

"The total length of the line proposed to be abandoned is approximately 26.96 miles, more or less, all located in the County of Butte, State of California. However, although it is to be abandoned as main line track hereunder, that portion of line between M.P. 207.08 and M.P. 210.77 will be retained in place, connected to the line proposed to be acquired and operated by applicant as a spur track or branch line serving the dam site.

"(d) Applicant seeks authority to abandon both the line and its

operation, with the exception, however, of the operation of the portion retained as a spur or branch as noted next above."

It seems clear that Western Pacific's single line of track to be abandoned yet retained in use as a spur track to serve the Dam began at Oroville near its old line mile post marker 205.47.

The Interstate Commerce Commision was fully informed that Zephyr, aside from being the name of one of Western Pacific Railroad Co.'s interstate passenger trains, was the name of this siding beginning at the City of Oroville, and was an alter ego for Oroville Dam for freight shipments to the Dam location. $50.00 and $60.00 per interstate car movement to a siding beginning in Oroville, without loading and unloading, could not, it is submitted, be a reasonable tariff for such movements by Western Pacific.

Western Pacific Notice of Independent Action 24 (Pl.'s Exh. 11, R. 68, 74) before the Interstate Commerce Commission spells out specifically that --

From Oroville
To Zephyr
the $50.00 and $60.00 car movements
"Applies only on traffic for movement over spur track of the State of California (subject to Note 2)". Note 2 is set forth on the 3rd and following revised pages to and including the 10th revised page of tariff 300, Pl.'s Exh. 9, R. 61,68. Said Note 2 reads:

"(a) Applies only on traffic which initially moved inbound to Oroville via W.P., except:

"(b) On traffic moving in Transcontinental Freight Bureau, Agent, Tariffs will also apply on traffic which does not initially move into Oroville, by W.P."

3. INSURANCE PROTECTING WESTERN PACIFIC FOR ORO DAM CONSTRUCTORS' FREIGHT HAULS.

Had this plan of shipping to Zephyr instead of Oroville Dam so as to restrict Oro Dam Constructors' railroad employees to California Workman's Compensation failed to work, then, in that event, Western Pacific had insurance protection to cover claims of Oro Dam Constructors' railroad employees. Said protection was restricted to claims under the Federal Employer's Liability Act, Pl.'s Exh. 18, R. 96. There was an insurable interest for that type of loss or obligation on the part of Western Pacific Railroad as well as an admission on its part that jurisdiction under the F.E.L.A. existed, otherwise there would not be an insurable interest for that type of loss under the policy. If there was no jurisdiction there could be no claim presented.

Every protection to Western Pacific Railroad Co. in said policy is based on the assumption that Oro Dam Constructors was to perform all carrier functions in the movement of car freight between Zephyr and the Dam, which Western Pacific would have done had it not been for Oro Dam Constructors. It would seem that this Court's decision in the case of Sinkler v. Missouri Pacific R. (1958), 356 U.S. 326, 78 Sup. Ct. 758, 2 L. Ed. 2d 799, was the very basis for writing said insurance policy as it was written. Any

type of loss to property or injury to an employee or third persons which Oro Dam Constructors could conceivably cause as an interstate common carrier by railroad in the movemnt of railroad freight to or from Zephyr was in law the responsibility of Western Pacific Railroad Co. as premised by said insurance policy. No other loss was contemplated by the protection given Western Pacific in said policy.

If a railroad employee of Oro Dam Constructors was injured at a time when the employer was not actually engaged in interstate commerce, but during a time when said employer was generally providing that service in the place of Western Pacific, then that employee would have the protection of F.E.L.A. in an action against Oro Dam Constructors.

In the case of Kach v. Monessen Southwestern Ry. Co. (1945), 151 Fed. 2d 400, the injured fireman was by analogy employed by a company under similar circumstances to that of Pickney. Pickney was employed by Oro Dam Constructors as a diesel locomotive engineer. The employers of each man took a part with other carriers in the continuous movement of interstate railroad freight from time to time and as such, became subject to the power of Congress under the commerce clause of the Constitution even though the railroad itself did not transport freight across the state line.

Both employees at the times of their respective accidents were not engaged in moving interstate freight.

The Act of August 11, 1939 amended Section 1 of the Federal Employer's

Liability Act by adding thereto the following provision: "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate ... commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of the Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act."

In the Kach case:

"The evidence discloses that the defendant receives cars loaded with raw materials consigned to the Steel Company from the two connecting railroads and places them at the appropriate points in the works of the Steel Company. It also receives from the Steel Company cars loaded with the manufactured product of the company and moves them from the points of loading to the points of connection with the connecting railroads. The defendant however does not publish tariffs of any kind, does not issue bills of lading, its name does not appear on any of the bills of lading covering the inbound shipments received from the connecting carriers and it does not participate in any of the freight rates covering the materials transported by those railroads."

In Sinkler v. Missouri Pacific R. (1958), supra, this court holds that the term "agents" in the statute meant, "[When] a railroad employee's injury caused in whole or in part by the fault of others performing under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of F.E.L.A." Oro

Dam Constructors and its railroad employees were performing an operational activity for Western Pacific.

Western Pacific's "Use and Occupancy" policy, Pl.'s Exh. 17, R. 96, protected it from any loss due to interruption of common carrier railroad freight service to the Dam over its interstate line between Zephyr and the Dam.

The insurable interest protected by said policy was Western Pacific's responsibility to the Interstate Commerce Commission for the movement of interstate freight cars over said line from Zephyr to the Dam even though Oro Dam Constructors moved all of said freight pursuant to its agreement to build the Dam. Western Pacific gave up possession of said spur track to the State of California in its contract of August 10, 1962, but retained an easement for its railroad right of way to the Dam, which continued to be under the regulatory powers of the Interstate Commerce Commission. An example of that power is set forth in point 7 of (e), pages 14-15 herein, when Western Pacific on June 11, 1963 threatened to refuse movement of freight to the Oroville Dam (while Oro Dam Constructors was actually moving it) until tariff rates had been established with the Interstate Commerce Commission to cover traffic movements by Oro Dam Constructors for the Dam.

Western Pacific had the right under Federal law to authorize Oro Dam Constructors, as it did through the State of California by agreement with the State, to take and use part of Western Pacific's right of way for a dirt fill haul route and

also provide Common Carrier service over said right of way to the Dam. Said agreement with the State was the August 10, 1962 agreement, Pl.'s Exh. 2, R. 33, 34. The Interstate Commerce Commission continued to have regulatory power over interstate movements even though Oro Dam Constructors made the movements. Said movements were an operational activity of Western Pacific under the Sinkler case, supra.

Judge Frey in writing the opinion for the Ninth Circuit has said, "The evidence simply did not show that Oro Dam Constructors had ever moved freight for others over the track in question." This is equivalent to saying that the formal contracts made for common carrier railroad service at the Oroville Dam beginning in 1957, Pl.'s Exh. 1, R. 22, 27, the transfer by contract of August 10, 1962, Pl.'s Exh. 2, R. 33, 34, from Western Pacific to Oro Dam Constructors of that obligation to provide such service to the Dam, Western Pacific's insurance policy protecting it from claims of injured employees of Oro Dam Constructors under F.E.L.A. with coverage beginning on September 26, 1962, Pl.'s Exh. 18, R. 96, the Interstate Commerce Commission order approving the continued use of the California spur track (from Zephyr to the Dam) as part of Western Pacific's interstate line, Pl.'s Exh. 14, R. 75, the published tariffs filed with the Interstate Commerce Commission for freight hauling over said spur, Pl.'s Exh. 9, R. 61, 68, the insurance policy protecting Western Pacific's contingent obligation to provide said service should Oro Dam Constructors fail to do so, Pl.'s Exh. 17, R. 96, and also the risk of loss to freight cars or their contents while in the posses-

sion of Oro Dam Constructors, Pl.'s Exh. 18, R. 96, were meaningless contract obligations and the 79 freight bills, Pl.'s Exh. 8, R. 59, 68, prepared by Western Pacific from its 1964 and 1965 demurrage records restricted and ended Western Pacific's liability for the loaded freight cars and any further movement of them after Western Pacific set said cars out on Zephyr siding.

4. CONCLUSION.

All of the evidence presented by plaintiff-appellant in support of jurisdiction for the death loss under the F.E.L.A. are legal conclusions, the legal interpretation of contracts, the legal meanings of Western Pacific Co.'s actions before the Interstate Commerce Commission as well as Oro Dam Constructors' admissions as to the movement of all rail freight left at Zephyr before and following the date of the accident killing Pickney on October 7, 1965. There can be no issue as to what the legal meaning of this evidence is. There is no issue of fact on the evidence presented by plaintiff.

Under the holding of the Erie R. Co. case, supra, it would be necessary to say that the 74 freight bills covering Western Pacific's billing for interstate car movements for cars it left at Zephyr were not interstate movements but rather that the interstate movement had ended at Oroville City and that the freight car movements beyond that City by public or private arrangement between the State of California, Oro Dam Constructors, Western Pacific and the consignees of freight represented by said freight bills, were private hauls instead of common carrier

hauls, since the movement of car freight from one end of the siding could not, by reason of said freight bills, be different from the movement of the same loaded car from the other end of said siding.

The basis for this petition is that the judgment below decided a federal question in a way in conflict with the applicable decisions of this Court, in the Erie case and the Sinkler case, supra.

It is respectfully urged that Joe Pickney, a diesel locomotive engineer employed by Oro Dam Constructors, performed an operational activity with his employer for Western Pacific Railroad Company, and he had the protection of the Federal Employer's Liability Act at the time of his death in this action against Oro Dam Constructors and Western Pacific Railroad Company.

July 20, 1971

Respectfully submitted,

Dee B. Tanner

DEE B. TANNER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, Plaintiff-Appellant, vs. ORO DAM CONSTRUCTORS, etc., et al., Defendants-Appellees.	No. 24,467

[April 30, 1971]

Appeal from the United States District Court for the Eastern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and *FREY, District Judge

FREY, District Judge:

Appellants are here complaining of the judgment of the trial court dismissing the complaint following a preliminary hearing pursuant to Rule 12(d), Rules of Civil Procedure. The trial court dismissed on finding lack of jurisdiction of the Federal District Court.

Appellants, plaintiffs below, filed an action invoking federal jurisdiction by

*Honorable William C. Frey, United States District Judge, Tucson, Arizona, sitting by designation.

alleging a claim for wrongful death under Federal Employer's Liability Act, 45 U.S.C.A. 51. The defendants denied applicability of F.E.L.A. The purpose of the preliminary hearing was to determine the applicability of F.E.L.A. The husband-father of plaintiffs had been killed in a head-on train collision while he was operating a railroad engine pulling a trainload of earth material for defendant Oro Dam Constructors. Decedent's engine was struck by a train of empty cars which was returning from a similar haul.

There is no conflict in the evidence that decedent was employed by defendant Oro Dam Constructors, that Oro Dam Constructors was a construction combine or joint venture engaged in building Oroville Dam across the Feather River near Oroville, California, that defendant Western Pacific Railroad had no supervision or control or direction of any sort over decedent; all of the track, equipment and area involved were under the exclusive jurisdiction, supervision and control of defendant Oro Dam Constructors; and that Western Pacific never exercised any direct or indirect supervision, control or direction over any of the operations or employees of Oro Dam Constructors.

The facts relied on by appellants to substantiate their claim of jurisdiction in the Federal District Court via F.E.L.A. are that Western Pacific Railroad is and was a common carrier by railroad in interstate commerce, that the track on which the collision occurred was once a part of the Western Pacific system, that Western Pacific retained certain rights to furnish common carrier service over the track from its Zepher terminal to the dam site and

also retained certain other rights with respect to the track in question.

Plaintiffs also contend that freight cars assigned to Oro Dam Constructors and others involved in the dam construction had on occasion been moved by Oro Dam Constructors from Zepher, the Western Pacific terminal point, to the dam site. The evidence simply did not show that Oro Dam Constructors had in fact ever moved any freight for others over the track in question. However, even conceding arguendo that Oro Dam Constructors had on occasion moved freight from Zepher to the dam site, there was absolutely no evidence that it had engaged in any such activity for or on behalf of Western Pacific or as a common carrier; nor was it doing so at the time of Pickney's death.

The evidence is uncontradicted that all the track in question was abandoned by Western Pacific as an integral part of its system pursuant to a track relocation agreement which was part of the Oro Dam construction program. It is also clear that Western Pacific retained a right to furnish common carrier service over the old track to the dam site along with certain other rights. However, it is undisputed that Western Pacific had no obligation or duty to furnish such service, did not do so, and no such service was ever requested. In short, Western Pacific never exercised any of the rights which it reserved and there was no obligation to do so; no freight was ever consigned beyond Zepher and Western Pacific never delivered or directed the delivery of anything beyond Zepher. All of Western Pacific's common carrier activities terminated at Zepher.

To come within the scope of coverage under F.E L A., the following elements must be present:

(1) The employee must be employed by a common carrier by railroad, as the term used in the F.E L.A. "means one who operates a railroad as a means of carrying for the public--that is to say, a railroad company acting as a common carrier." Edwards v. Pacific Fruit Express Company, 390 U.S. 539, 541, 88 S. Ct. 1239, 1240, 20 L. Ed. 2d 112 (1968) citing Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187-188, 41 S. Ct. 93, 98, 65 L. Ed. 205.

The railroad maintained and operated by the defendant Oro Dam Constructors clearly is not a common carrier based on the reasoning and test of Lone Star Steel Company v. McGee, 380 F. 2d 640 (1967), and Ciaccio v. New Orleans Public Belt Railroad, 285 F Supp. 373 (1968) and cases cited therein with facts similar to this case.

(2) The common carrier by railroad must be engaged in interstate commerce. Washington Railway & Electric Co. v. Scala, 244 U.S 630, 61 L. Ed. 1360, 37 S. Ct. 654 (1917); Philadelphia & Reading Railway Company v. Hancock, 253 U.S. 284, 64 L. Ed. 907, 40 S. Ct. 512 (1920); McCluskey v. Marysville and N. R Co., 243 U.S. 36, 61 L. Ed. 578, 37 S. Ct. 374 (1917); Bay v. Merrill & Ring Logging Co., 343 U.S. 40, 61 L. Ed. 580, 37 S. Ct. 376 (1917).

(3) An employee of a common carrier by railroad, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall in any way directly or closely and substantially affect such commerce. Southern

Pacific Company v. Gileo, 351 U.S. 493, 100 L. Ed. 1357, 76 S. Ct. 952 (1956); Reed v. Pennsylvania Railroad Company, 351 U.S. 502, 100 L. Ed. 1366, 76 S. Ct. 958.

Plaintiffs' case fails to meet any one of the tests or criteria, much less all of them.

Plaintiffs' attempts to construe the evidence in this case so as to bring it within F.E L A., must fail. The facts simply do not lend themselves to a proper conclusion of applicability of F E L.A. The trial court's findings of fact are supported by substantial evidence and will not be overturned on appeal. Zenith Radio v. Hazeltine Research, Inc., 395 U S. 100, 89 S. Ct. 1562, 23 L Ed. 2d 129 (1969); Soderham Machine Manufacturing Company v. Martin Bros. Container & Timber Products Corp., 415 F. 2d 1058 (1969), citing the Zenith case; Vessella v. United States, 405 F. 2d 599 (1969). The decedent's employer (Oro Dam Constructors) simply was not at any time engaged in any activity which could classify it as a common carrier by railroad in interstate commerce, nor was Oro Dam Constructors doing anything at the time of Pickney's death which directly or indirectly was in furtherance of interstate commerce or which in any way effected interstate commerce so as to bring this case within the scope of 45 U.S.C A., Sec. 51.

The District Court was correct in dismissing plaintiffs' action; that judgment is AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MILDRED A. PICKNEY and THOMAS E. PICKNEY, a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,

Plaintiffs,

vs.

ORO DAM CONSTRUCTORS, et al,

Defendants.

No. Civ. S-410

JUDGMENT.

The above entitled cause came on for trial before the above entitled Court on the jurisdictional issues involved on April 15, 1969; Dee B. Tanner appearing as counsel for plaintiffs herein, and Claire H. Greve and Raymond A. Leonard appearing as counsel for The Western Pacific Railroad Company and Oro Dam Constructors, a joint venture consisting of Codell Construction Company, a corporation, R. P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation; Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman

Construction Company, Inc., a corporation, R. B. Potashnick, an individual, Wright Contracting Company, a corporation, and after hearing the allegations and proofs of the parties hereto and the arguments and briefs of counsel, and being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith.

NOW, THEREFORE, by reason of law and the findings and conclusions aforesaid, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That any action against defendants, Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R B Potashnick, an individual, Wright Contracting Company, a corporation, by Joe Pickney, also known as Joseph F. Pickney, deceased, or any of his heirs, is barred by Section 3601 of the Labor Code of the State of California, and that their only and exclusive remedy against said defendants, Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R. P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R. B. Potashnick, an individual, Wright Contracting Company, a corporation is before the Workmen's Compensation Appeals Board of the State of California.

2. That neither Joe Pickney, also known as Joseph F. Pickney, nor plaintiffs herein have any cause of action against the defendants, The Western Pacific Railroad Company or Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R. P Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R. B. Potashnick, an individual, and Wright Contracting Company, a corporation, under the provisions of the Federal Employers Liability Act (45 U S.C A. Section 51 et seq.).

3. That this Court is wholly without jurisdiction of the above entitled action as to defendants or any of them, and that the above entitled action and the whole thereof be and the same is hereby dismissed, and that defendants recover from plaintiffs their costs taxed herein in the sum of $_____.

Dated: April 24, 1969.

s/ M. D. Crocker
Judge

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EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MILDRED A. PICKNEY and THOMAS E. PICKNEY a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,	)	
Plaintiffs,	)	
vs.	)	Civil No. S-410
ORO DAM CONSTRUCTORS, etc., et al,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This is an action for damages under the Federal Employer's Liability Act (Title 45 U.S.C. §§ 51 et seq.). Plaintiffs have a similar action pending against one of the defendants, Western Pacific Railroad Company, in the Superior Court of California in and for the County of Butte. Western Pacific Railroad Company has moved for abatement or dismissal of this action pending the disposition of the prior action in the State Court.

I have examined the record, and I am inclined to agree with defendant that these actions should have been consolidated

at the outset. Unquestionably, it would have been jurisdictionally possible to do so (See: Title 45 U.S.C. § 56 and United Mine Workers v. Gibbs, 383 U.S. 715).

It is, however, equally unquestionable that plaintiffs have a right to pursue the matter in separate forums if they so choose. This is particularly true here, since the action before the State Court involves only one of the defendants in this action and recovery is there sought under state, rather than Federal, law.*

Federal law has long tolerated overlapping proceedings between Federal and State Courts. There is no general rule which requires a Federal Court to abate or dismiss proceedings within its jurisdiction merely because of a plea of a prior action pending in a State Court (See: Adams v. State of California, 176 F. Supp. 456, 459; citing Stanton v. Embry, 93 U.S. 548).

IT IS, THEREFORE, ORDERED that defendant's motion to abate or dismiss be, and the same is, hereby denied.

DATED: November 20, 1968.

SHERRILL HALBERT
UNITED STATES DISTRICT JUDGE

*Additional problems are posed by the statute of limitations, but discussion thereof is unnecessary at this time.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-145

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, for herself and for DAVID R. PICKNEY, MRS. WALTER C. HAWKINS, and THOMAS E. PICKNEY, a minor, by his Guardian ad litem, Mildred A. Pickney,
Plaintiffs and Petitioners,

vs.

ORO DAM CONSTRUCTORS, a joint venture, etc., et al., and WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Defendants and Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. FACTUAL BACKGROUND

The petitioners in this proceeding are the purported widow (and legal representative) of David R. Pickney, deceased, and the surviving heirs of said decedent. Pickney, at the time of his death on Oct. 7, 1965, was employed by respondent, Oro Dam Con-

structors (hereinafter O.D.C.), and was on duty as such at that time. This action was brought purportedly pursuant to the Federal Employers Liability Act, 45 U.S.C. 51 et seq. (hereinafter F.E.L.A.).

O.D.C. was, at all material times, a joint venture consisting of seven corporations and one individual, organized for the purpose of constructing a dam across the Feather River, at a location some 5.5 miles easterly (upstream) from Oroville, California. This construction was undertaken shortly following February 18, 1963, pursuant to contractual arrangements between O.D.C. and the State of California, Department of Water Resources (hereinafter "State"). The main line of the Western Pacific ("W.P.") prior to 1963, extending eastward from Oroville, was located in the canyon of the Feather River, and was therefore subject to being inundated by the water held back by the completed dam. W.P. and the State therefore contracted for the building of a relocated line, which was completed and placed in service on February 18, 1963. Thereupon W.P. wholly abandoned all operations over the former line in the Feather River Canyon, although by agreement W.P. reserved the right to perform common carrier service over that part of the former line which extended up to the Dam site, if request was made for such service. No such request was ever made, and no such common carrier service over that line was ever performed subsequent to February 18, 1963, by either W.P. or any other person or agency.

The W.P.'s new (i.e., relocated) line departed from its former line at a point in the Feather River

Canyon designated as Zephyr, located about two miles upstream (i.e., eastward) from Oroville. The former line, extending eastward from Zephyr to the Dam site, a distance of about 6.2 miles, was conveyed by W.P. to the State. After the rails thereon had been replaced, this state-owned trackage was used by O.D.C., as part of the railroad trackage employed by O.D.C. to move gravel and other like materials from a borrow pit west of Oroville, up to the Dam site. This line was also used occasionally to move machinery, or other equipment and materials, loaded in freight cars which were billed to O.D.C., or in its care, *at Zephyr.* Such loaded cars were moved to Zephyr by W.P., and there delivered to O.D.C., as the actual consignee, usually specified as such on the shipping documents.

W.P. did not participate in, control, or supervise any of these movements, or any other movements, made by O.D.C. over the state-owned trackage, either easterly from Zephyr to the Dam site, or westerly to the borrow pit.

The decedent Pickney was employed by O.D.C. as an engineer operating locomotives upon the state-owned trackage between the borrow pit and the Dam site, passing through Zephyr. While working in this capacity, on October 7, 1965, upon a locomotive hauling open-top cars loaded with gravel and like materials from the borrow pits near Oroville eastward to the Dam site, his locomotive collided head-on with a similar locomotive hauling empty cars westward to the borrow pit. Pickney was killed in this collision.

The accident occurred at a point about 2.5 miles east of Zephyr, and thus upon a section of line which had been abandoned and relinquished by W.P. some two-and-a-half years earlier.

It was expressly conceded, in open court by petitioners (Tr., 119-120)[1], that the decedent was not engaged in interstate commerce at the time of the accident.

This action was brought in the United States District Court for the Eastern District of California, by the personal representative (Mildred A. Pickney) of the decedent, for herself and certain others, assertedly pursuant to the F.E.L.A. Damages are demanded in the amount of $300,000.00 (R. 82).[1]

II. PROCEEDINGS IN THE DISTRICT COURT AND THE COURT OF APPEALS

The proceedings in the District Court were in response to a motion for a preliminary hearing, under Rule 12(d), F.R.C.P., to determine whether the Court had jurisdiction in the premises (R. 269-270). That hearing, held on April 14 and 16, 1969, was duly reported.

While petitioners have attached to their petition a copy of the opinion and decision of the Court of Appeals rendered on April 30, 1971 (now officially

[1]References to the Clerk's Transcript of the Record herein are indicated by the letter R. and the page number. References to the Reporter's Transcript of the proceedings before the District Court are indicated by the letters Tr. and the page number.

reported, 441 F.2d 806-808) which they seek to have reviewed, they have wholly omitted any mention of the Findings made by the District Court which initially heard and decided this case.

In summary, the District Court found: (1) the decedent Pickney was employed by O.D.C., and at the time of the accident was acting in the scope of his said employment; (2) decedent was covered by Workmen's Compensation Insurance, obtained by O.D.C.; and an award had been made to his surviving son; (3) O.D.C. was not a railroad common carrier, had never held itself as such, and at the time of the accident was not engaged in interstate commerce; (4) W.P. had no right to supervise, direct, or control the decedent, and did not do so; decedent was never an employee of W.P., or of any interstate railroad common carrier; (5) W.P. and O.D.C. were never engaged in any joint enterprise as claimed by plaintiffs; O.D.C. was never an agent or employee of W.P.; no freight was consigned to the Dam site; W.P. never hauled any freight to the Dam site; O.D.C. never engaged in hauling interstate freight shipments for W.P., or under any contract with W.P., or otherwise, or at all.

Upon the basis of these findings the District Court concluded that plaintiffs had no cause of action against either O.D.C. or W.P., predicated upon F.E.L.A., and that it (the Court) had no jurisdiction in the premises. Judgment was entered accordingly (R. 378-380). Said judgment is reproduced as an appendix to petitioners' brief.

The appeal to the Court of Appeals for the Ninth Circuit followed in due course, and as stated that Court's decision was rendered on April 30, 1971. In its opinion the Court remarked particularly that there was "*no conflict* in the evidence", which statement was followed by a recital of the facts, virtually reproducing the findings made by the District Court.

III. ARGUMENT

1. THE FINDINGS OF FACT OF THE TRIAL COURT ARE BASED UPON UNCONTRADICTED EVIDENCE, AND ARE ADEQUATE AND CONTROLLING.

While petitioners do not expressly challenge the correctness of the findings of fact made by the District Court, it is apparently their position that other findings should have been made in response to the evidence, and also that other inferences should have been, but were not, drawn from the evidence by the District and Appellate Courts.

The Court of Appeals stated, in its opinion (441 F.2d at p. 107), that all of the track, equipment, and area involved were under the exclusive jurisdiction, supervision, and control of O.D.C. This statement was based largely upon portions of the District Court's Findings Nos. 4 and 5; and these findings, in turn, reflect the undisputed testimony produced before that Court. Nevertheless petitioners now assert (their brief, p. 15) that W.P. had the *right to control* O.D.C.'s operation of the railroad line between Zephyr and the Dam site.

The same argument was made in petitioner's presentation to the Court of Appeals (their brief in that Court, pp. 22-27), and was rejected, by that Court, in the same vein as the earlier conclusions of the District Court, viz., "that W.P. never exercised any direct or indirect supervision, control or direction over any of the operations or employees of O.D.C."

Furthermore, at several passages of their brief, petitioners employ expressions intended to convey the conclusion that O.D.C. was operating as a common carrier, "subject to Interstate Commerce Commission control", in handling freight cars from Zephyr to the Dam site (or to the borrow pit) and return (e.g., pp. 1, 5, 10: "the movement of *interstate freight* between Zephyr and the Dam").

These statements (or inferences) find no support whatsoever in the record. To the contrary, the District Court specifically found as a fact (Finding No. 3, R. 374) that O.D.C. was *"not a common carrier,"* and "never held itself out to be a *common carrier*", and was *not* engaged in . . . *"interstate commerce"* at any time.

There is simply no basis for petitioners' attempts to misconstrue, challenge, or otherwise seek to alter the meaning and effect of the District Court's findings. Having been based upon adequate evidence, which was wholly undisputed, those findings by the Court, sitting without a jury, are immune to attack upon this attempted appeal.

Rule 52(a), F.R.C.P., expressly provides that in actions such as this, tried upon the facts without a

jury, findings of fact *shall not* be set aside unless clearly erroneous.

Compare, also:

Zenith Radio Corp. v. Hazeltine Research (1969), 395 U.S. 100, 123;

Commissioner v. Duberstein (1960), 363 U.S. 278, 289-291;

U.S. v. National Ass'n, etc. (1950), 339 U.S. 485, 495-496.

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2. THE DECISION OF THE COURT OF APPEALS IS SUPPORTED IN PRINCIPLE BY NUMEROUS EARLIER DECISIONS INVOLVING SIMILAR FACT SITUATIONS.

There have been many decisions of the Courts, including not less than three by this Court, which involved facts much the same as in the case at bench, in each of which the final ruling was the same as the rulings made here by the Courts below. These decisions include:

Edwards v. Pacific Fruit Express Co. (1968), 390 U.S. 538;

Wells Fargo & Co. v. Taylor (1920), 254 U.S. 175;

Robinson v. Baltimore & Ohio R. Co. (1915), 237 U.S. 84;

Goulden v. S.P. Co. (C.A. 9, 1949), 174 F.2d 1022;

Hetman v. Fruit Growers Exp. Co. (C.A. 3, 1965), 346 F.2d 947;

Aguirre v. S.P. Co. (1965), 232 Cal.App.2d 636;

Moleton v. Union Pac. R. Co. (1950), 118 Utah 107, 219 P.2d 1080.

The essence of the decision in the *Edwards* case was that an employee of Pacific Fruit Express Co. (P.F.E.) could not maintain an F.E.L.A. action against that company because P.F.E., although a subsidiary of two railroads (Southern Pacific and Union Pacific) was not a "common carrier by railroad". This Court cited its own earlier decisions in *Taylor* and *Robinson,* in which similar rulings were made. Reference was also made, in *Edwards,* to the *Gaulden, Aguirre,* and *Moleton* cases, each of which was an attempted action brought under F.E.L.A., by an employee of P.F.E., against one or the other of the two railroad companies which together own P.F.E. and utilize its services pursuant to contract. In each of these cases it was held that an employee of P.F.E. was not an employee of the parent railroad; and that, as an employee of a company which was not a common carrier, he could not maintain an F.E.L.A. action. It may be noted that in *Moleton,* certiorari was denied (340 U.S. 932).

Since it is admitted here that the decedent was never employed by W.P., the only interstate common carrier involved, but only by O.D.C., and it is fully shown (and expressly found) that O.D.C. was not a common carrier at any time, those facts are completely adequate to bar this attempted action.

The contention is made, however, that the inbound carload shipments arriving over the W.P. at Zephyr, and handled from that point to the location of ultimate use, continued to be shipments in interstate commerce until actually unloaded, and that in consequence O.D.C. was engaged in interstate commerce, because of having hauled such supposed interstate shipments. This contention is discussed briefly elsewhere in this reply, with reference to the authority (*Erie R. Co. v. Shuart* (1919), 250 U.S. 465) upon which petitioners rely. Apart from the plain inapplicability of the *Shuart* case to the facts here shown, there are several decisions since the date of that decision, which demonstrate that petitioner's argument is invalid. Among the more noteworthy of these cases are the following:

Kelly v. General Electric Co. (E.D. Pa., 1953), 110 F.Supp. 4 (aff'd, C.A. 3, 1953, 204 F.2d 692; cert. denied, 1953, 346 U.S. 886);

Tilson v. Ford Motor Co. (D.C. Mich., 1955), 130 F.Supp. 676;

Duffy v. Armco Steel Corp. (D.C. Pa., 1964), 225 F.Supp. 737 (aff'd, C.A. 3, 1964; 380 F.2d 644);

Ciaccio v. N. O. Public Belt R. Co. (D.C. La., 1968), 285 F.Supp. 373;

Ciaccio v. N. O. Public Belt R. Co. (D.C. La., 1968), 290 F.Supp. 196;

Grider v. C.B. & Q. Ry. Co. (Ill. App., 1965), 207 N.E.2d 703.

Each of these cases involved a fact situation similar in its essentials to the fact situation in the case at bench; i.e., (1) a rail facility owned by an industry

whose principal business was other than operating a railroad; (2) the use of that railroad facility to move cars, both loaded and empty, between a connection with a common-carrier railroad and one or more locations where cars delivered at the connection were either loaded or unloaded; (3) an employee of the industry, whose duties involved the movement of such cars over the employer-industry's rail facilities, but not beyond; (4) an injury incurred while performing such duties; (5) an action for damages predicated upon F.E.L.A. In each case the action was dismissed, upon the ground that F.E.L.A. was by its terms inapplicable and unavailable. As note *ante*, one of these cases (*Kelly v. General Electric Co.*), certiorari was denied by this Court (346 U.S. 886).

In its opinion herein the Court of Appeals referred (p. 808) to the decision in *Lone Star Steel Co. v. McGee* (C.A. 5, 1967), 380 F.2d 640 (cert. den., 1967, 389 U.S. 977) as setting forth the tests which determine whether a particular company or entity is an interstate common carrier by railroad within the meaning of F.E.L.A. These tests, as stated in *Lone Star* (380 F.2d at p. 647), are as follows: (1) actual performance of rail service; (2) which service is performed as a part of total rail service contracted for by a member of the public; (3) performance by the entity as a part of a system of interstate rail transportation, pursuant to common ownership or by contract with a railroad; and (4) receipt of remuneration for the service performed.

These same criteria were recently recited again in the opinion in *McCrea v. Harris Co. etc. District*

(C.A. 5, 1970), 423 F.2d 605 (cert. den., 1970; 400 U.S. 852).

It is apparent from the record here that O.D.C., as the decedent's admitted employer, did not come within the scope of any one of the *Lone Star* criteria, let alone all four. First, O.D.C. did not perform any "service" for anyone. It operated locomotives hauling cars over tracks, but only for its own purposes, and not for anyone else. Second, none of O.D.C.'s rail operations were a part of a rail service contracted for by anyone. No member of the public ever contracted for, or ever requested, rail service by O.D.C. or over its rails, or could have done so; there was literally no habitation or industry in that area, other than O.D.C.'s facilities. Third, O.D.C. never operated as a part of any system of transportation, pursuant to either contract or common ownership. O.D.C. and W.P. were completely independent; and O.D.C.'s contract with W.P. was concerned solely with the *protection* of W.P.'s properties, not with the *operation* of O.D.C.'s *facilities*. Fourth, no monetary or other remuneration was received by O.D.C. on account of its railroad operations; none could be so received, for O.D.C. was hauling only freight which it either owned, or was planning to use in its dam-building project.

The decision of the Court of Appeals here sought to be reviewed and reversed is thus on all fours with all of the relevant and controlling authorities. Three of these decisions, which were rendered by Courts of Appeal, were afterwards brought to this Court's attention by petitions for certiorari, and such petitions were in each case denied.

3. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS CITED BY PETITIONERS, OR WITH ANY OTHER BINDING PRONOUNCEMENT OF AN APPELLATE TRIBUNAL.

Apparently recognizing that this Court's Rule 19 (1)(b) sets forth the character of the reasons which this Court will consider in passing upon their petition, petitioners assert (their brief, p. 38) that the Court of Appeals has herein decided the federal question (of applicability of F.E.L.A. in the premises) in a way in conflict with (1) applicable decisions of this Court, and (2) the decision of another Court of Appeals dealing with the same question.

The decisions of this Court to which petitioners refer are:

Sinkler v. Missouri Pacific R. Co. (1958), 356 U.S. 326;

Erie R. Co. v. Shuart (1919), 250 U.S. 465.

The decision of the Court of Appeals, cited by petitioners in this connection, is:

Kach v. Monessen S.W. Ry. Co. (C.A. 3, 1945), 151 F.2d 400.

The question in the *Sinkler* case was, as in the case at bench, whether the injured person could maintain an F.E.L.A. action; but the facts were entirely different. Sinkler, the claimant, was admittedly an employee of Missouri Pacific, a railroad common carrier in interstate commerce, and was injured while on duty in one of its cars. The injury was allegedly due to the negligence of the Houston Belt & Terminal Railway Co., a switching (i.e., terminal) carrier at Houston, Texas, likewise a common carrier by rail-

road in interstate commerce, which as such was acting as an agent of Missouri Pacific at the time of Sinkler's injury. In these circumstances it was held by this Court that Sinkler could bring his action, under F.E.L.A., against his employer, to recover damages for injury caused by his employer's agent. The essence of this Court's opinion was that since the Belt Line was performing for the Missouri Pacific certain "operational activities" of that railroad (i.e., the picking-up and/or delivery of cars which had been or were to be handled in line-haul movement by Missouri Pacific), it was in effect the agent of that line-haul carrier.

The differences of fact between *Sinkler* and the case at bench are so clear, and so substantial, as to render that case wholly inapposite here. In *Sinkler,* the injured plaintiff was an employee of the defendant interstate railroad. In the case at bench, the decedent was admittedly never an employee of the defendant railroad (W.P.) In *Sinkler,* the injury was allegedly due to the negligence of an agent of the employer, which was held to have that status (as agent) because it performed, *for the railroad employer,* services which otherwise the latter would have been obligated to perform. In the case at bench, the negligence, if any, which allegedly caused Pickney's death was that of O.D.C., which was never an agent of W.P., never performed any service which W.P. was otherwise obligated to perform (no request for such service having ever been made), and was never controlled in any respect by W.P. Finally, the company (the Belt Ry.) allegedly responsible for Sink-

ler's injury was itself a common carrier, and the alleged injury was sustained at the time of, and in conjunction with its operation as such; whereas in the case at bench the entity (O.D.C.) allegedly responsible for Pickney's injury was not, and never had been, a common carrier; moreover, Pickney's injury was sustained in the course of an operation (by O.D.C.) which was wholly local in character (the movement of gravel from the borrow pit to the Dam site), and did not have any possible relation to interstate commerce.

The *Erie Railroad* case (250 U.S. 465), is without any bearing upon the questions sought to be presented here. In *Erie* this Court held that freight (in this case, live horses) loaded in a car which was being spotted for unloading after arrival at the billed destination, but had not yet been unloaded, was still in the course of transportation by the carrier in possession, and would have continued so until the actual unloading at the billed destination had been completed. The billing of the car contemplated that such unloading would be performed *by the railroad* at the billed destination. Petitioners herein refer to the fact that some 79 or more loaded cars are shown to have been billed from various origin points to O.D.C., or in its car, for delivery at W.P.'s station at Zephyr, and to have been delivered there to O.D.C., and urge that these cars were not unloaded at Zephyr, but were instead moved by O.D.C. from Zephyr to either the Dam site or the borrow pits for unloading. From this petitioners argue (their brief, pp. 26, 37, 38) that these cars were still moving in interstate commerce,

when being handled by O.D.C., and until finally unloaded. The *Erie* case does not in the least support petitioners' argument. In *Erie,* as this Court's opinion shows, the contract of carriage called for the movement of the loaded carload to the billed destination, and for the carrier to unload the cargo (the horses) at that destination. Until this agreed unloading by the carrier was completed, the transportation service contemplated by the parties was still in progress.

In the case at bench, by contrast, the billing contained no reference to unloading at Zephyr, the billed destination, nor was it contemplated that any cars would be unloaded at that station. The common-carrier transportation service in interstate commerce performed by W.P., as the delivering carrier, was complete and was ended, when the loaded cars were placed on the siding at Zephyr where O.D.C. could and did take possession. Any movement of these cars thereafter was undertaken, *by O.D.C.,* for its own purposes, at such times and under such conditions as it might elect; but such movements were not and could not have been in "interstate commerce", because (1) O.D.C. was not a common carrier, (2) O.D.C. was not moving these cars for account of W.P., or any one else other than itself, or persons or companies immediately associated with it in the Dam project, (3) O.D.C. never acted on behalf of W.P., in handling these shipments to locations beyond Zephyr.

As the Court of Appeals pointed out in its opinion herein:

"The evidence simply did not show that O.D.C. had in fact ever moved any freight for others over the track in question. However, even conceding arguendo that O.D.C. had on occasions moved freight from Zephyr to the Dam site, there was absolutely no evidence that it had engaged in any such activity for or on behalf of W.P. or as a common carrier . . .".

Compare, also, the District Court's finding that *no* freight was consigned *to the Dam site;* that *W.P. never* hauled any freight *to the Dam* site; and that O.D.C. never engaged in hauling interstate freight shipments for W.P., or otherwise *or at all* (R. 375).

The decision of the Court of Appeals in the case of *Kach v. Monessen S.W. Ry. Co.,* supra, is of dubious value, in the light of its own facts; and in any event, that decision has no bearing here because of substantial and controlling differences. Among these differences are: (1) The Monessen S.W. Ry. Co., the employer of the allegedly injured plaintiff Kach, was a common carrier by railroad which (though not itself in interstate commerce) regularly handled loaded cars containing interstate shipments. O.D.C., the actual employer here, was never a common carrier, and never handled any shipments, until after their movement in interstate commerce had been completed, or before such interstate movement commenced; (2) Monessen charged and received monetary compensation for the transportation services which it performed. O.D.C. never received or demanded any such compensation; in fact, to have "collected" such charges would have been merely a "paper" transaction, because O.D.C.

was moving only its own freight or freight which it intended to use; thus to have made "charges" would have meant merely that the moneys were shifted from one pocket to another. (3) Monessen was organized for the purpose of performing transportation, and this was its *only* activity. O.D.C. was not organized for any such purpose; its movement of cars over the State-owned trackage was merely incidental to its primary purpose: i.e., the building of the dam. (4) Interstate shipments hauled inbound by Monessen were actually billed for delivery at the appropriate unloading points, at the plants of Monessen's parent company and sole owner. Interstate outbound shipments were similarly billed from the parent's plant, and handled from those billing points by Monessen. Inbound shipments thus did not complete their journeys, in interstate commerce, until delivered by Monessen at the billed destinations; and outbound shipments commenced their interstate journeys, when picked up at the plants by Monessen. By contract, inbound shipments to O.D.C. were never billed to the Dam site (or the borrow pit), or over the State-owned O.D.C. trackage, for any movement. All such shipments were billed to O.D.C. (or in its care) *at Zephyr,* and were delivered there, thus ending their movement in interstate commerce. Outbound shipments were handled similarly; i.e., such shipments moved as *billed* shipments *from Zephyr,* as the original billing point, and not from any other point of origin. (5) Monessen was owned by the steel company whose traffic Monessen principally handled, but the two were nevertheless separate and distinct entities.

Monessen's rail operations were thus separate and distinct from the manufacturing operations of the steel company. By contrast, O.D.C.'s railroad operations were not separately organized or conducted, but on the contrary were an integral, though relatively minor, part of the entire dam-building project.

It will be seen that the *Kach* case clearly does not reach to, or even resemble in any degree, the case at bench, when the factual distinctions between the two are fully understood. There was here, as the Courts below both impliedly found, simply no through movement of interstate freight beyond Zephyr, by W.P., or any other common carrier, or anyone else on behalf of W.P., or otherwise; no involvement of any common carrier in such movement; no relationship of any kind between the duties performed by the petitioners' decedent, and the conduct of interstate commerce by W.P. In short, in view of the factual distinctions, the *Kach* case simply has no application here, and the decision of the Court of Appeals herein cannot be held to be in conflict with that decision.

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4. INACCURATE STATEMENTS AND ERRONEOUS INFERENCES CONTAINED IN PETITIONERS' BRIEF:

(a) The contracts between the State and W.P.

In rather confused fashion, petitioners attempt (their brief, pp. 3-5, 8-11), to argue that certain contracts entered into between the State and W.P., prior to the relocation of W.P.'s line and the commencement of the construction of the Dam, provided for

common-carrier service to and from the Dam site; hence, so petitioners assert, rail service between Zephyr and the Dam site, even though performed by O.D.C., must have been performed pursuant to this contract and the discharge of W.P.'s alleged obligation to provide such service, and hence was performance of a common carrier "operational activity" by O.D.C., on behalf of W.P. and as its agent.

This argument loses sight of two controlling facts, which petitioners fail to mention: (1) W.P., when by agreement it abandoned the (State-owned) trackage formerly a part of its line east of Zephyr, reserved only the *right (if requested)* to perform service over the abandoned trackage, but did not hold itself out to do so, *unless requested;* and as the record abundantly shows and petitioners admitted, and the District Court expressly found, W.P. did not at any time haul freight to the Dam site (and was never requested to);

(2) No "common carrier" service of any kind was even required, or performed, over the State-owned trackage between Zephyr and the Dam site, because O.D.C. was handling only its own freight, or freight of others consigned in care of O.D.C., and in so doing was not acting as agent of, or in concert with, W.P.

(b) The published tariffs in evidence as Plaintiff' Exhibit 9 (R. 339-346).

At page 11 of their brief petitioners refer to "published tariffs for moving freight from Oroville to Oroville Dam"; and in subsequent passages it is asserted that such rates were published "which would apply on traffic movements over the spur track . . .

out of Zephyr, from Zephyr to the Dam". These statements or inferences are knowingly and designedly false, as is shown (1) by the tariffs themselves, and (2) by the sworn testimony of petitioners' own witness Marken (Tr. 63-66). The tariff items expressly show (R. 339-346) that the per-car rates there set forth applied only "*from* Oroville *to* Zephyr", prior to Sept. 25, 1963, and *between* Oroville *and* Zephyr (i.e., in either direction), after that date (R. 343). The testimony of Mr. Marken, given in response to leading questions from petitioners' counsel, showed that the rates in question applied only to movements "to the connection" (i.e., to Zephyr), and not to any movement beyond (Tr. 62-65).

It is not shown, or claimed by petitioners, that any traffic moved under these particular rates; indeed, the record indicates (R. 293, 356) that these rates were never actually applied. In any event, and if such traffic did so move, that movement *under these rates* either ended or began at Zephyr, not at the Dam. W.P. never operated beyond Zephyr at any time after February 18, 1963; and O.D.C. was not a party to these rates, nor an agent of W.P. for the purpose of performing transportation service (or any other service) that W.P. might have been (but never was) called upon to perform.

In short, petitioner's argument and assertions in respect to the rates between Oroville and Zephyr are deliberately misleading, and squarely contradicted by the specific tariffs themselves, by the testimony of the tariff expert whom they called as their principal wit-

ness, and by the verified replies of W.P. to petitioners' interrogatories (R. 293, 356).

(c) The freight bills covering shipments handled by W.P. to or from Zephyr.

At pages 5-8 of their brief petitioners refer to the 79 freight bills furnished to their counsel, which covered inbound carload shipments handled by W.P. to Zephyr, and there delivered to O.D.C. as either the actual consignee or the authorized receiver of the freight. Apparently it is petitioners' position that the cars represented by these freight bills could not have ended their movement at Zephyr, but must have been moved further (i.e., to the Dam site or some other location where the contents could be used), and therefore continued to be in interstate commerce (v. pp. 7-8, 37-38 of their brief).

It may be quite true that, as occasion required, O.D.C. moved these cars from Zephyr, over the State-owned trackage, to locations reached by that trackage; but it is equally clear that such moves were not made in interstate commerce, or by an interstate common carrier by railroad. The only interstate common carrier involved was W.P.; and as the record shows, and both the Courts below have held:

> "Western Pacific never delivered or directed the delivery of anything beyond Zephyr. All of Western Pacific's common carrier activities terminated at Zephyr". (441 F.2d at p. 808; and see, also, Finding 5 of the District Court: R. 375).

In point of fact, and as the record indicates, any such moves of loaded freight cars beyond Zephyr

were made by O.D.C. for its own account and its own purposes; the contents of the cars were in all instances O.D.C.'s own property. There is simply no showing at all that O.D.C. ever moved a single car for account of anyone else, or ever collected or sought to collect compensation for such a move.

The freight bills relied upon by petitioners are clear and cogent evidence that when the cars to which they relate arrived at Zephyr and were delivered to O.D.C., their movement in interstate commerce had been completed. O.D.C. was not a common carrier in interstate commerce; and the subsequent moves of these cars by O.D.C. were not movements in interstate commerce.

(d) The alleged "right" of W.P. to control O.D.C.'s operations on the State-owned trackage.

Petitioners again urge (their brief, pp. 15-16), as they did in the Courts below, that by virtue of a contract dated October 26, 1962, W.P. had the right to control O.D.C.'s operations upon the railroad line between Zephyr and the Dam site; i.e., the railroad line conveyed by W.P. to the State, and which petitioners now, for some undisclosed reason, choose to identify erroneously as *"Western Pacific Railroad Co.'s* right of way between Zephyr and Oroville Dam".

The contract provisions upon which petitioners rely are quoted at page 16 of their brief. The contract plainly requires only that the contractor (O.D.C.) shall so conduct its operations as not to "endanger or interfere with the safe operation of the tracks and property of the Railroad", (i.e., W.P.). The latter,

through its Chief Engineer, was authorized to require such acts or changes on the part of O.D.C. as might be needed to eliminate hazards to or interferences with W.P.'s own operations *on W.P.'s own newly constructed railroad*. The Chief Engineer was not, however, empowered to direct O.D.C. when or whether to operate a train, or if so what speeds to observe, or the number of cars to be included, or any other details of O.D.C.'s operations. His instructions to O.D.C. could be only for the purpose of eliminating interferences with W.P.'s own operations, and not otherwise.

There is no showing that W.P. ever undertook to exercise any control over O.D.C.'s operations, and in fact no attempt was ever made by petitioners to support this claim. It may be noted, also, that petitioners admitted on the record (Tr. 139) that W.P. did not have any control over the decedent.

(e) The insurance policies issued to W.P.

At pages 16-24 of their brief petitioners quote at length from the text of two insurance policies issued *to W.P.* prior to the date of decedent's accident, and apparently in effect on that date; and at pages 32-35 a somewhat disjointed argument is attempted, the substance of which is that W.P., by obtaining these policies, admitted that it had a contingent liability, in the event of a personal injury incurred in the course of operations by O.D.C. over the State-owned trackage.

Petitioner's premises in conjunction with this argument are not only false, but are fully known by them

to be of that character; furthermore, their conclusions are illogical and erroneous.

Thus, at page 16 of petitioners' brief, it is asserted (and emphasized in capitals) that there was "an Insurance Policy protecting W.P.'s continuing duty to provide common carrier service at the Dam for the State and others should O.D.C.'s common carrier service be disrupted".

In fact, W.P. did not have any duty, continuing or otherwise, after February 18, 1963, to provide service to the Dam. On or shortly after that date, W.P. abandoned the trackage east of Zephyr for all purposes, and transferred ownership thereof to the State. We emphasize again that no request for service over this trackage was ever made upon W.P. thereafter, and no such service was performed.

The quoted statement is further misleading and erroneous, in stating or implying that O.D.C.'s operations were "*common carrier service*". All of the evidence in this record is to the contrary, and the Court of Appeals expressly stated in its opinion that "the railroad . . . operated by O.D.C. clearly is not a common carrier".

The fact is that the insurance policy referred to by petitioners was obtained by O.D.C., pursuant to the agreement between W.P. and the State dated Oct. 26, 1962, for the purpose of protecting W.P. against loss occasioned by interruptions of railroad operations upon its own *relocated* mainline, if such interruptions were caused by O.D.C.'s activities upon the *old* main line (after the transfer to the State, and during the

use thereafter by O.D.C.). The *old* main line closely adjoined the new line for a considerable distance east of Zephyr, and there was thought to be a possibility that O.D.C.'s activities on the *old* line (such as bank widening, rerailing, and the like) might interfere with W.P.'s operations on its (new) main line. The insurance policy would effectively save W.P. from loss in such circumstances. This purpose is made clear from the portions of the text of the policy quoted at pages 17-18 of the petitioners' brief.

The policy referred to under Item (10), pages 20-25 of petitioners' brief, was likewise primarily for the benefit of W.P., in that it protected W.P. against claims for damage to property, or injury to persons, arising out of O.D.C.'s activities. In line with their other misrepresentations, petitioners in their discussion of this policy refer to an alleged contract which, as they say, "made provision for O.D.C. to collect for the freight it hauled for others". The record here shows affirmatively that O.D.C. never hauled freight for others, and of course did not collect from others for a service which it did not perform. Both of the Courts below in effect found that O.D.C. never engaged in hauling freight for others. As the Court of Appeals said (441 F.2d at p. 807):

> "The evidence simply did not show that O.D.C. had in fact moved any freight for others over the track in question".

Petitioners assert (their brief, p. 32) that by obtaining insurance against claims made under F.E.L.A., W.P. had admitted that "jurisdiction under F.E.L.A."

existed with respect to employees of O.D.C. The suggestion is completely fanciful. It is obvious that many claims may be made against a railroad (or other employer), some of which may have merit, while others (such as the instant claim) clearly have no merit at all. Nevertheless a defense must be provided for virtually all, irrespective of merit. Defense of these claims, meritorious or not, involves expense; and that expense frequently can be best taken care of by means of insurance. W.P.'s insurance here was clearly only for the purpose of assuring a defense to any and all claims; it could not be regarded as an admission that any one claim, or group of claims, had any validity.

IV. CONCLUSION

This case is neither novel nor unsual. On the contrary, it involves facts and circumstances which have been presented in both the Federal and State Courts, again and again. In each such case involving similar facts as shown herein, it has been held that F.E.L.A. is not applicable. The same result should follow here, and the petition should therefore be denied.

Dated, Sacramento, California,
August 23, 1971.

Respectfully submitted,

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